

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOWARD LASHAWN SMITH,

Defendant-Appellant.

UNPUBLISHED
February 17, 2004

No. 244238
Wayne Circuit Court
LC No. 01-012858-01

Before: Schuette, P.J., and Meter and Owens, JJ.

MEMORANDUM.

Defendant appeals as of right his convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a jury trial. We affirm.

The prosecutor began his rebuttal closing argument by contending that defense counsel had argued facts not in evidence. The prosecutor then noted that defendant was not required to present any evidence and stated, “[t]hat is what he did. He didn’t do nothing.” The trial court immediately interrupted and instructed the jury that defendant had no burden of proof, that defendant’s silence could not be held against him, and that the burden of proof remained on the prosecution. Subsequently, the trial court instructed the jury that counsel’s comments were not evidence and that defendant had the right to remain silent.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. *Id.* The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

A prosecutor may not shift the burden of proof. *People v Fields*, 450 Mich 94, 113; 538 NW2d 356 (1995). A prosecutor may not comment on the defendant’s failure to present corroborating evidence. *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987).

Defendant argues that the prosecutor denied him due process and a fair trial by improperly shifting the burden of proof. We disagree that reversal is required. The trial court interrupted immediately and in effect objected on defendant's behalf. Where preserved constitutional error occurs, it is harmless if the benefiting party demonstrates on appeal that no reasonable possibility exists that the error might have contributed to the conviction. *People v Smith (On Remand)*, 249 Mich App 728, 730; 643 NW2d 607 (2002). A prosecutor's remarks must be evaluated in the context in which they were made and in light of defense arguments. *Noble, supra* at 660; *Schutte, supra* at 721. The prosecutor's remarks were arguably improper; however, reversal is not required under the circumstances. Immediately following the prosecutor's challenged comments, the trial court gave a comprehensive curative instruction. A jury is presumed to follow its instructions. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Any prejudicial effect of the prosecutor's remarks was cured by the trial court's timely instruction. See, generally, *Schuette, supra* at 721-722. Given the evidence against defendant, there is no reasonable possibility that the prosecutor's remarks contributed to the verdict. *Smith, supra* at 730.

Affirmed.

/s/ Bill Schuette
/s/ Patrick M. Meter
/s/ Donald S. Owens